

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

THERMION, INC.,

Plaintiff,

v.

THERMION METALIZING SYSTEMS,  
LTD.,

Defendant.

Case No. C05-5409FDB

ORDER GRANTING CERTAIN  
PRELIMINARY INJUNCTIVE  
RELIEF TO DEFENDANT AND  
DENYING PLAINTIFF'S MOTION  
FOR PRELIMINARY INJUNCTION

**INTRODUCTION**

This cause of action arises primarily under the United States trademark laws, 15 U.S.C. § 1051 *et seq.* Plaintiff pleads seven counts, which include (1) trademark and service mark infringement, (2) trade name infringement, (3) common law trademark infringement, (4) false designation of origin and description of fact, (5) violation of the Washington State Consumer Protection Act, (6) unfair competition and trade dress infringement, and (7) breach of contract. The Court has federal question jurisdiction over the trademark claims and supplemental jurisdiction over the state claims.

Both parties are Washington corporations with their principal places of business in Silverdale, Washington, both parties allege that they do their business throughout the United States. and both

1 parties' businesses involve metalizing or twin wire arc spray systems. Plaintiff alleges that it designs,  
2 manufactures, sells, and services these systems, and Defendant alleges that it designs, assembles,  
3 sells, and services these systems.

4 The alleged trademark ownership and usage rights, contract rights, and fiduciary duties  
5 derive from an approximate twenty-year relationship between Plaintiff and Defendant where "few, if  
6 any, agreements were reduced to writing." (Joint Status Report, p. 3.)

7 Plaintiff alleges that this matter arose when Plaintiff, the manufacturer of arc spraying  
8 machinery, attempted to end a long-term relationship with its distributor – Defendant – "which had  
9 entered into a partnership with a large competitor of Plaintiff." *Id.* Plaintiff also alleges that  
10 Defendant is using Plaintiff's marks, products, patents, good will, and other proprietary information  
11 inappropriately and without authorization.

12 Defendant counterclaims alleging that it owns the Thermion trademark and that Plaintiff has  
13 misappropriated the goodwill associated with the mark, causing confusion among Defendant's  
14 customers and distributors, that Plaintiff has been unfairly competing with Defendant, its exclusive  
15 distributor, by selling directly to Defendant's customers, and that Plaintiff's trademark registration  
16 was fraudulently obtained and should be cancelled. Defendant also alleges trademark and service  
17 mark infringement, tortious interference with contractual relations, tortious interference with  
18 business expectancy, breach of fiduciary duties, and violations of the Washington Consumer  
19 Protection Act. Defendant seeks a declaratory judgment that Defendant owns the Thermion  
20 trademark and that Plaintiff's trademark registration was fraudulently obtained and should be  
21 cancelled.

22 This matter is presently before the Court on cross-motions for a preliminary injunction.

### 23 PRELIMINARY INJUNCTION STANDARD

24 To obtain a preliminary injunction, the moving party must show either (1) a combination of  
25 probable success on the merits and the possibility of irreparable injury or (2) that serious questions

are raised and the balance of hardships tips in its favor. *Benda v. Grand Lodge of the Int'l Ass'n of Machinists & Aerospace Workers*, 584 F.2d 308, 314-15 (9<sup>th</sup> Cir. 1978), *cert. dismissed*, 441 U.S. 937, 99 S.Ct. 2065, 60 L.Ed.2d 667 (1979); *see also, Sega Enterprises LTD. v. Accolade, Inc.*, 977 F.2d 1510 (9<sup>th</sup> Cir. 1992). These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. *Oakland Tribune, Inc. v. Chronicle Publishing Co.*, 762 F.2d 1374, 1376 (9<sup>th</sup> Cir. 1985), *Accord, United States v. Nutri-cology, Inc.*, 982 F.2d 394, 397 (9<sup>th</sup> Cir. 1992).

To demonstrate a likelihood of success on the merits in a trademark action, a party seeking injunctive relief must prove (1) ownership of a valid trademark, and (2) a likelihood that the allegedly infringing mark will be confused with its own mark. *Omega Nutrition v. Spectrum Marketing*, 756 F. Supp. 435, 437 (N.D. Cal. 1991).

#### DISCUSSION OF RESPECTIVE CLAIMS

It cannot be doubted that Plaintiff's and Defendant's use of the Thermion mark in the market for metalizing or twin wire arc spray systems generates confusion, and both parties agree that there is a likelihood of confusion by Plaintiff's and Defendant's use of the Thermion mark.

To avoid confusing references to the parties' names, which both contain the word "Thermion," further references to Plaintiff Thermion, Inc. will be to TINC and to Defendant Thermion Metalizing Systems, Ltd. will be to TMS.

The likelihood of confusion being a given in this case, the remaining question is who is the rightful owner of the Thermion mark.

Under the Lanham Act, a federally registered mark is prima facie evidence of the registrant's ownership of the mark. 15 U.S.C. §§ 1057(b) and 1115(a) (1982 & Supp. 1990).

Plaintiff TINC claims ownership of "U.S. Trademark Registration No. 2,871,557 for the mark THERMION and Design" for use with its metalizing process, registered August 10, 2004 based on a first use in 1990. (Frank Rogers Decl. ¶ 4.) TINC also claims ownership of pending U.S.

1 Trademark Office application to register the word mark THERMION in connection with sprayers  
2 and other equipment. (*Id.* ¶ 5.)

3 ***Defendant TMS's Evidence Rebutting TINC's Ownership Claim***

4 Defendant TMS must rebut the presumption of Plaintiff TINC's ownership by a  
5 preponderance of the evidence. *Omega Nutrition v. Spectrum Marketing*, 756 F. Supp. 435, 437-38  
6 (N.D. Cal. 1991).

7 Defendant TMS asserts first use of the THERMION word and design marks. TMS contends  
8 that it began using the THERMION mark in connection with the sale of goods in 1988 and has been  
9 using it virtually exclusively for over fifteen years. Defendant TMS also asserts that in addition to  
10 being the first to affix the mark to the product, TMS's name has consistently appeared with the  
11 trademark on the product and in trade show displays and advertising over the past eighteen years;  
12 that TMS has maintained the quality and uniformity of the product, made customer warranties,  
13 serviced many of the products it sold, and participated in certifying the product to meet international  
14 standards.

15 In its statement of facts (referencing attendant declarations), TMS contends that Frank  
16 Rogers founded TINC, which designed and manufactured metalizing equipment, and Mahlon Wixson  
17 founded TMS, which marketed and sold TINC's metalizing equipment on an exclusive basis, along  
18 with other metalizing accessories. TMS contends that Mahlon Wixson's long work in the field,  
19 creating and maintaining business and sales contacts developed the THERMION name as a  
20 trademark, which TMS now exclusively owns. TMS contends that while TINC operated as  
21 Thermion Arc Systems (TASCO) from 1982 to about 1987 and sold some metalizing equipment,  
22 that equipment was not labeled, packaged, sold, or displayed with the THERMION trademark.  
23 (David Wixson Decl. ¶ 5.) The operator manual referred to the product as the "TASCO arc spray  
24 gun." (D. Wixson Decl. ¶ 7.)

25 TMS contends that in 1987, Mahlon Wixson and Frank Rogers verbally agreed that Wixson

1 would exclusively market, sell, and distribute the TASCO spray machines. Then in 1988, Wixson  
2 hired his daughter, Yvette Wixson, to design marketing materials and a logo for the company. Yvette  
3 Wixson created a dragon logo and later – in about April or May 1990 – a “long T” logo for  
4 THERMION as used in Thermion Metalizing Systems (the top of the “T” in Thermion is stretched  
5 over the top of the other letters in the word.). (Y. Wixson Decl. ¶¶ 5, 13, 14.) TMS contends that  
6 it first marked equipment with the THERMION logo designed by Yvette Wixson when Mahlon  
7 Wixson purchased the first labels in around 1991. (D. Wixson Decl. ¶ 13.) TMS asserts that it  
8 stands behind the quality of the products it delivers under the THERMION mark, and cites a legal  
9 claim that arose from an explosion at a coatings facility using TINC’s machines, and that TINC  
10 tendered the defense of the claim to TMS. (D. Dixon Decl. ¶ 24.)

11 Defendant TMS points out that with respect to Plaintiff TINC’s registration of the “long T”  
12 THERMION design mark, TINC originally claimed first use in 1980, but later amended its claim to  
13 first use as of January 31, 1990. TMS contends that such first use by TINC is impossible, because  
14 the design was not developed in its final form by Yvette Wixson until later 1990 and 1991. (Y.  
15 Wixson Dec. ¶¶ 13, 14.) TMS is seeking to have TINC’s U.S. Registration No. 2,871,557 (Design  
16 Mark) and U.S. Application Serial No. 78/682,643 (Word Mark) cancelled, and if granted, TMS  
17 would apply to register the Design and Word marks with different dates of first use and a different  
18 identification of goods and services, and would not agree to disclaim the word “Thermion,” since  
19 that term is distinctive when used in connection with TMS’s goods and services. (J. Simmons Decl.  
20 ¶ 7) Defendant TMS also points out that on February 11, 2004, Plaintiff TINC specifically  
21 disclaimed the exclusive right to use the word “thermion” in response to a U. S. Patent and  
22 Trademark Office action declaring that term descriptive on September 9, 2003: “The applicant’s  
23 goods use thermions, [“an electrically charged particle, especially an electron, emitted by a  
24 conducting material at high temperatures”] therefore, the mark describes a feature of the goods.” (S.  
25 Simmons Decl. Exs. B and C.)

1           ***Plaintiff TINC's Reply in Support of Its Ownership Claim***

2           TINC submits that beginning with the first machine built in 1982, Frank Rogers personally  
3           affixed the THERMION mark to the back and top of each machine by hand, using individual letter  
4           stickers, and that between 1982 and 1988, before any involvement with Mahlon Wixson, TINC sold  
5           eight machines. (Frank Rogers Supp. Decl. ¶ 2.)

6           TINC argues that while it is true that a trade name cannot be registered with the U.S.  
7           Trademark Office, a trade name is protectable against confusing use by another, since trade names  
8           often function as trademarks or service marks as well. Lanham Act. 15 U.S.C.A. § 1125; RCW §  
9           19.86 *et seq.* TINC asserts that it is not disputed that Frank and Rosanna Rogers of Thermion Arc  
10          Systems Co. originated the THERMION name as early as 1982. (Decls. Of Frank and Rosanna  
11          Rogers.) Upon incorporation, the Thermion Arc Systems Co. name carried over into the present  
12          Thermion, Inc. business name, which was registered with the State of Washington on June 1, 1995.  
13          (F. Rogers Supp. Decl. ¶ 8.).

14          TINC asserts that in 1988 it entered into an agreement with Mahlon Wixson for TMS to  
15          market and sell specific THERMION machines, and TMS was permitted to use the THERMION  
16          name and mark in connection with the marketing and sale of the specified machines by an oral  
17          license. (F. Rogers Supp. Decl. ¶ 3.) TINC asserts that it was responsible for product quality. *Id.* ¶  
18          8.) Frank Rogers Supp. Declaration lists other things that TINC took responsibility for, such as  
19          editing sales materials for Mahlon Wixson and drafting owner's manuals. *Id.* ¶ 13, 14.

20           ***Defendant TMS's Reply***

21          TMS sums up TINC's showing as mere trade name usage of a descriptive term that has had  
22          insufficient use by TINC to acquire secondary meaning. On the other hand, Mahlon Wixson's efforts  
23          on behalf of TMS in advertising the brand extensively, participating at trade shows and in industry  
24          groups to promote the THERMION brand over an eighteen year period created secondary meaning  
25          and value that now inheres in the THERMION mark. TINC's invoices, purchase orders, and its

1 operator manual show the product being referred to as the “TASCO arc spray machine” and the  
2 “Model A.” (F. Rogers Supp. Decl., Exs. C and H.) While TINC sold eight machines from 1982 to  
3 1988, TMS sold approximately 380 machines from 1989 to 2004. TMS sets forth a chart of TINC’s  
4 and TMS’ activities through the years with respect to the mark. (TMS Reply p. 3.)

5 TMS argues that TINC’s showing is insufficient to show priority of use of the THERMION  
6 mark because of the eight items of generic equipment that TINC sold between 1982 and 1988, the  
7 sales are indicated by purchase orders generated by the buyers, and only four were sold in interstate  
8 commerce. (F. Rogers Supp. Decl. ¶ 1.) At most, TINC shows *de minimus* use of the mark, citing  
9 J. Thomas McCarthy, 2 *McCarthy on Trademarks and Unfair Competition*, § 16.9 (“To establish  
10 ownership of a mark, the prior user must establish not only that at some date in the past it used the  
11 mark, but that such use has continued to the present. Such a continuous use implies something more  
12 than mere sporadic or de minimis sales.”)

13 TMS draws attention to the 1994 photograph submitted by TINC showing the THERMION  
14 mark that Frank Rogers claims to have personally affixed to the machine. (F. Rogers Supp. Decl. ¶  
15 2, Ex. A.) TMS asserts that the label depicted in the 1994 photograph was actually one of the  
16 number plates purchased by Mahlon Wixson in May 1989 from MetalCraft. (D. Wixson Supp. Decl.  
17 ¶ 6, Ex. B, copies of plate and packing slip.) Mahlon Wixson’s son explains that the first serial  
18 number was 50001 (representing Model 500, number 01). (D. Wixson Supp. Decl. ¶ 6) TMS notes  
19 that the plate in the 1994 photograph bears serial number 048, indicating a time later than May 1989.  
20

21 TMS argues that as a dealer, it can apply THERMION as its dealer mark (*See McCarthy*, §  
22 16.46 (“It is clear that one need not actually manufacture goods in order to acquire and own a valid  
23 trademark for the goods.”) and that it does have products of its own on which to use the mark. (D.  
24 Wixson Supp. Decl. ¶ 9.)

25 TMS disputes that it was an agent or licensee of TINC, which has the burden on this issue.

Under Washington law, “the burden of establishing an agency rests upon the one who asserts it.” *Moss v. Vadman*, 77 Wn.2d 396, 402-03 (1969)( “[A] prerequisite of an agency is control of the agent by the principal.” TMS submits that there is no evidence to support TINC’s agency theory. In fact, TINC’s documentary evidence shows references to Mahlon Wixson as his “business partner” and referred to the two companies as joint venturers. (D. Wixson Decl. ¶¶ 9 and 10, and Exs. D, E. And F.) TINC states that it only recently discovered that TMS had revised TINC’s operator manuals in the early 1990s and replaced TINC’s contact information with TMS’ information. (F. Rogers Supp. Decl. ¶ 15.) If so, concludes TMS, it clearly did not exercise control over TMS and its use of the mark. TMS submits that it held itself out to the public as THERMION for eighteen years with no complaint from TINC.

TMS contends that it was TINC’s independent, exclusive distributor, citing a November 20, 1996 letter from Frank Rogers to Alberta Power Ltd., wherein he stated: “As I mentioned on the phone, all Thermion equipment is sold by Thermion Metalizing Systems Ltd. You would send your purchase order directly to them. Their fax number is 360-698-1539 phone 360-692-6656, Dave or Mahlon Wixson.” (D. Wixson Supp. Decl. ¶ 11 and Ex. G.)

### ANALYSIS & CONCLUSION

It is the actual use of a designation as a mark that creates rights and priority over others. J. Thomas McCarthy, 2 *McCarthy on Trademarks and Unfair Competition*, § 16.1. “Constructive use” priority, obtained by filing an application for federal registration, “can always be defeated by another party’s evidence of a prior actual use.” *Id.* “Neither application for, nor registration of, a mark at the federal level wipes out the prior non-registered, common law rights of others. The non-registered rights of a senior user continue and are not trumped by the later federal registration by a junior user. *Id.* §§ 16.2, 16.18, 16.18.1.

“Inherently distinctive marks,” those that are so distinctive in and of themselves that legal protection is granted immediately upon adoption and use, such as fanciful and arbitrary marks, do



1 not require secondary meaning for protection., 2 *McCarthy*, § 16.3, and ownership of such marks is  
2 governed by priority of use. *Id.* § 16.4. A manufacturer may establish priority in a mark by using it  
3 in sales to a distributor. *Id.* § 16.5. *De minimis* use may not be sufficient to achieve priority of use.  
4 *Id.* 16.6. Use of the mark must also be in a bona fide sale and not an intra-corporate, non-arms  
5 length business transaction. *Id.* 16.7.

6 A distributor as well as a manufacturer may acquire a valid trademark for the goods.

7 That is, one who only distributes good made by another can be the “owner” of a  
8 trademark which the distributor places on the goods to identify the distributor. This  
type of mark is known as a “dealer’s mark” or a merchant’s mark.”

9 *Id.* § 16.46. Also, “... a single product may properly bear both a manufacturer’s mark and a  
10 merchant’s mark, so long as the separate identifying function of each mark is clear to customers.”

11 *Id.* § 16.48.

12 *McCarthy* goes on to discuss trademark ownership as between manufacturer and dealer and  
13 notes at the outset: “A dispute as to trademark ownership between a manufacturer and a distributor  
14 often presents difficult problems.” *Id.* § 16.48. Two situations are noted: (1) where a manufacturer  
15 owns a mark and enters into a distribution relationship with the dealer where the dealer does not  
16 acquire rights in the goods it distributes; (2) when a dealer buys goods from a manufacturer and  
17 applies his own “merchant’s mark” to the goods, the dealer, not the manufacturer, is the owner of  
18 such a trademark. *Id.* In either situation, the key issue is who was the initial owner of the mark. *Id.*  
19 Where there is a contract, both contractual expectations and consumer perception must be  
20 considered. *Id.* If there is no contractual provision for ownership of the disputed mark, a court must  
21 weigh factors such as the following:

- 22 1. Which party invented or created the mark.
- 23 2. Which party first affixed the mark to goods sold.
- 24 3. Which party’s name appeared on packaging and promotional materials in conjunction  
with the mark.
- 25 4. Which party exercised control over the nature and quality of goods on which the  
mark appeared.
- 26 5. To which party did customers look as standing behind the goods, e.g., which party

1 received complaints for defects and made appropriate replacement or refund.  
2 6. Which party paid for advertising and promotion of the trademarked product.

3 *McCarthy* § 16.48.

4 ***1. Which party created the mark:***

5 TINC asserts that Frank and Rosanne Rogers found the word in the dictionary and originated  
6 the THERMION name as early as 1982 when the company was known as Thermion Arc Systems  
7 Co. (TASCO) and carried over to its present business name Thermion, Inc. TINC cites its  
8 registration of the THERMION design mark (August 10, 2004 based on first use in 1990) and its  
9 pending registration of the word mark THERMION in connection with sprayers and other  
10 equipment.

11 TMS asserts that Yvette Wixson designed the dragon logo in about 1989 and the “long T”  
12 logo for THERMION for TMS’ use in about April or May 1990.

13 TINC disclaimed exclusive right to use the word “thermion” after the U.S. Patent and  
14 Trademark Office declared that term descriptive on September 9, 2003 because it describes a feature  
15 of TINC’s goods that use thermions. Thus, while TINC may use “thermion” in its business name,  
16 the assertion that Yvette Wixson created the dragon logo and the “long T” logo for TMS has not  
17 been rebutted. This factor favors TMS.

18 ***2. Which party first affixed the mark to goods sold:***

19 TINC asserts that beginning with its earliest sales of arc spraying equipment (1982 – 1988),  
20 Frank Rogers personally affixed the THERMION mark to the machines, and submits a 1994  
21 photograph. TINC asserts that all of its machinery has consistently been marked with the  
22 manufacturer’s label bearing the THERMION mark and that TMS has never disputed that it used the  
23 THERMION mark pursuant to a verbal license from TINC that was terminable at will.

24 TINC, however, has never proven that such a verbal license ever existed.

25 TMS submits evidence that it, through Mahlon Wixson, in May 1989 purchased the

1 numberplates from MetalCraft and began labeling the product in the manner shown in the 1994  
2 photograph. The labels show the name THERMION, and beneath that the words “Manufactured by  
3 Thermion Arc Systems,” and a serial number. The serial number in the 1994 photo indicates a date  
4 later than 1988, a date later than TINC’s eight sales between 1982 and 1988. Photographs of the  
5 early system from TINC (then TASCOS) show that the equipment was unmarked. (D. Wixson Decl. ¶  
6 5, Ex. A; and see Ex. I (April 1989 issue of *Metallinze* showing unmarked “Thermion 500 Arc Spray  
7 System.”) This factor favors TMS.

8 **3. Which party’s name appeared on packaging and promotional materials in conjunction**  
9 **with the mark:**

10 TINC asserts that it affixed the THERMION mark to the machines it sold in the 1982 - 1988  
11 period, and that from 1988-2005, with the priority of ownership of the THERMION trade name and  
12 trademark clearly established, it permitted TMS to use the THERMION name and mark in  
13 connection with the marketing and sale of the THERMION 500 machine and later the THERMION  
14 500M arc spray system. (F. Rogers Supp. Decl. ¶ 3) TINC asserts that it permitted the mark to be  
15 used in connection with the Bridgemaster, the Spraymaster and Metalizer systems. (*Id.* ¶¶ 3 and 5.)  
16 TINC asserts that TMS had no products of its own that it could legitimately label THERMION.  
17 TINC asserts that it edited marketing and sales materials. (F. Rogers Decl. ¶¶ 10, 13.)

18 TMS submits evidence that Mahlon Wixson attended trade shows, among other things, and  
19 cites Dave Wixson’s Declaration, Exhibits N, O, and P, which provides a sampling of some of  
20 TMS’s product promotion activities, including brochures and advertising. TMS has made a  
21 showing greater than TINC’s mere assertion of editing and unsubstantiated oral agreement giving  
22 TMS permission to use the mark. TMS asserts that it has developed or is currently developing its  
23 own metalizing systems to sell under the THERMION name, including the Handi-Arc, the  
24 Bridgemaster (U.S. Registration No. 2,677,300, (Simmons Decl. ¶ 8.), and others. (D. Wixson,  
25 Supp. Decl. ¶ 9.) This factor favors TMS.

1           **4. Which party exercised control over the nature and quality of goods on which the mark**  
2           **appeared:**

3           TINC asserts that as manufacturer of the products it necessarily assumed responsibility for  
4 the quality and uniformity of its products. ( F. Rogers Supp. Decl. ¶¶ 3, 6-8.)

5           TMS asserts that it insured the quality of the products delivered under the THERMION  
6 brand. (TMS Response, p. 6.)

7           Both parties make a weak showing on this factor, and it favors neither party.

8           **5. To which party did customers look as standing behind the goods, e.g., which party**  
9           **received complaints for defects and made appropriate replacement or refund:**

10          TINC asserts that it stood behind its goods and refers to the 1997 accident in Houston.  
11 TINC states that it tendered no claim regarding this accident to TMS, and that when OSHA  
12 requested that TINC as the manufacturer of the machines provide for an examination of the  
13 equipment, Frank Rogers and a third-party mechanic traveled to the accident site to inspect the  
14 machines at issue and that TMS had no significant involvement. (F. Rogers Supp. Decl. ¶ 18.)

15          TMS asserts that regarding the 1997 Houston accident, a subpoena was addressed to  
16 Thermion Metalizing (TMS) but sent to TINC's address, and Frank Rogers signed for the letter,  
17 which was sent by certified mail. (D. Wixson Supp. Decl., ¶ 19, Ex. N.)

18          Neither party makes a significant showing on this factor, and the mail sent to one party at the  
19 other's address simply demonstrates confusion. This factor favors neither party.

20           **6. Which party paid for advertising and promotion of the trademarked product:**

21          It appears that around June 2004, TINC began using its website to advertise factory direct  
22 sales and that TINC's first magazine advertisement appeared in *Coatings Pro*, in the Spring of 2005.  
(D. Wixson Decl. ¶¶ 30, 32.)

23          TMS, however, has provided evidence of its advertising since 1988 and expenditure of nearly  
24 \$100,000 on advertising from 1996 to 2001. (D. Wixson Supp. Decl. ¶ 4, Ex. A.) This factor favors  
25 TMS.

1 Concluding that TMS created the design mark THERMION with the “long T” and that TINC  
2 is not entitled to exclusive use of the word “thermion”; that TMS first affixed the THERMION mark  
3 to the goods; that TMS used the mark extensively in promotional materials; and that TMS made the  
4 greater expenditure related to advertising since 1988; TMS has made a sufficient showing of  
5 likelihood of success – that is, a showing of ownership of a valid trademark – to defeat TINC’s  
6 showing on these cross-motions for summary judgment and to obtain the preliminary injunction that  
7 it seeks.

8 The next question is what should be preliminarily enjoined.

9 TINC is not entitled to exclusive use of the word “thermion.” Neither is TINC entitled to use  
10 the graphic design THERMION with the elongated T described in Yvette Wixson’s declaration.

11 TMS urges the Court to find a long-term, exclusive marketing and distribution agreement for  
12 the sale of thermal metalizing equipment between the parties, which they began performing in 1988.  
13 On the record submitted, the Court cannot make such a finding.

14 TMS is entitled to exclusive use of the design THERMION with the elongated T described in  
15 Yvette Wixson’s declaration.

16 NOW, THEREFORE,

17 IT IS ORDERED:

18 1. Defendant/Counterclaimant TMS’s Cross-Motion for A Preliminary Injunction [Dkt. #  
19 36] is GRANTED as follows:


20 a. Plaintiff Thermion, Inc. (TINC, *supra*) is not entitled to exclusive use of the word  
21 “thermion” and is restrained from any attempt to enforce such entitlement;

22 b. Defendant/Counterclaimant Thermion Metalizing Systems, Ltd. (TMS, *supra*) is  
23 entitled to exclusive use of the design THERMION with the elongated T described in Yvette  
24 Wixson’s declaration.

1           2. Defendant/Counterclaimant Thermion Metalizing Systems, Ltd. shall post a bond with the  
2 Court in the amount of \$5,000.00 within ten days of the entry of this order.

3           3. Plaintiff Thermion, Inc.'s Motion for Preliminary Injunction [Dkt. # 30] is DENIED.

4 DATED this 21<sup>st</sup> day of March, 2006.

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7 FRANKLIN D. BURGESS  
8 UNITED STATES DISTRICT JUDGE  
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